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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Adoption of IAN O., a Minor.	
KATE F., Plaintiff and Respondent, v. MICHELLE B., Defendant and Appellant.	A105900 (Solano County Super. Ct. No. A6179)

Michelle B. (appellant) appeals from a judgment terminating her parental rights with respect to her now seven year old son, Ian O. We affirm.

BACKGROUND

Ian was born to Michelle and Dr. William O. in May 1997. Kate F. (respondent) is married to William and is Ian's stepmother. Ian has lived with William and Kate his entire life. Kate sought to terminate Michelle's parental rights so that Kate could adopt Ian.

A. The Surrogacy

William and Kate were unable to conceive a child without medical assistance and decided to use a surrogate. Michelle agreed to act as a surrogate for Kate after responding to an advertisement Kate and William put in a newspaper.

After unsuccessful attempts at in vitro fertilization with Kate's eggs, they agreed to attempt a surrogacy with Michelle's eggs. William and Michelle entered into a

surrogacy contract on May 23, 1995. The contract was not prepared by an attorney. Kate's name does not appear anywhere in the contract. It states William is to be the sole parent of the child born from the surrogacy and is to have "sole rights to, custody of, and control of" the child from birth. The contract states Michelle agrees to terminate and not claim any parental rights, nor represent herself as the child's parent.

Although the surrogacy contract does not name Kate, William testified at trial that he and Michelle understood 1) Kate would be the mother and 2) there would not be any contact between the child and Michelle. Michelle chose not to attend trial and thus did not contradict this testimony.

Michelle became pregnant with William's child after 10 or 11 artificial insemination attempts.[1] During the pregnancy, Kate and William provided financial support to Michelle for her maternity and medical expenses.

Kate's intent from the beginning of the pregnancy was that she would be Ian's mother, and she has always thought of Ian as her son. She testified Michelle promised many times to sign a consent allowing Kate to adopt Ian. Michelle never said anything indicating she intended to be the mother of the child. In fact, Kate testified, Michelle was "adamant" that Kate was the mother.

Two days before Ian was born, Michelle signed a stipulation for entry of judgment, along with a supporting declaration, to establish William's paternity. Shortly after his birth, she signed a declaration stating her wish that William be declared Ian's father. None of these documents, prepared by William's attorneys, mentions Kate. Michelle's declarations state it is her wish that their son remain in William's "care and custody" and that she agrees to give "all parental rights and responsibilities" to William.

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[1] William is a medical doctor. To save money, he performed almost all of the artificial inseminations himself using his own sperm. Michelle later complained to the Medical Board of California about his dual role as her doctor and as sperm donor pursuant to a surrogacy contract. William received a letter of reprimand from the Medical Board, was required to take an ethics course, and paid $3,000 for the cost of the investigation.

B. The Alameda County Action

Pursuant to the stipulation for entry of judgment, William filed a complaint in Alameda county superior court shortly before Ian's birth. He then filed an ex parte application for entry of judgment seeking to establish his paternity, supported in part by Michelle's declaration described above.

Michelle answered the complaint on September 3, 1997, when Ian was just over 3 months old, requesting joint legal custody and visitation at least two days a week. She also filed an OSC seeking a temporary visitation order and attorneys fees. She claimed in an attachment to the OSC that she and William discussed possible custody arrangements for Ian, including custody with Michelle during the week and with William on weekends. In a subsequent declaration, Michelle stated the child would not have been conceived if, prior to conception, William had told her she would not be allowed to visit the child.[2] William opposed Michelle's OSC, disputing all of Michelle's assertions. William then filed an amended complaint adding Kate as a plaintiff, asking for a determination that William and Kate were Ian's intended legal parents, and seeking sole custody with no visitation rights for Michelle.

On October 26, 1998 a hearing was held. It was supposed to be limited to the issues of visitation and attorney's fees pendente lite. However, the trial court proceeded to enter judgment for Kate and William based almost entirely on the OSC filings. The court ruled that Kate and William were Ian's intended parents, Kate was not required to go through a stepparent adoption process, and the surrogacy contract was enforceable against Michelle. This Court reversed, holding it was error to decide the question of parental rights at that hearing without a trial. We remanded the matter to the trial court with directions to enter an order pendente lite concerning visitation and attorneys fees, and to then proceed to trial.

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[2] At one point, Michelle filed a declaration claiming, for the first time, that Ian had been conceived from intercourse with William. She used this fact in an accompanying points and authorities to argue an appellate decision regarding surrogacy did not apply because it involved a child created by artificial insemination, whereas Ian had been conceived by intercourse.

Our decision was filed August 4, 2000. Although Michelle prevailed on appeal, she has done nothing further on that action since then.

C. Michelle's Solicitation of Murder Conviction

During February 10 through 16, 1999, Michelle solicited someone to kill her ex-husband. She was convicted of soliciting another to commit murder on October 26, 2000 and sentenced to six years in prison. She was incarcerated from January 2001 to October 2003. Her parole began October 26, 2003 and continues through 2006.

D. Michelle's Contact with Ian

At the time of the trial in the case before us, Ian was three months shy of his seventh birthday. Ian has never lived with Michelle. He does not know her or even that she exists.

Since Ian's birth, Michelle has only visited Ian once when he was three weeks old. Michelle's only other communications or contacts with Ian have been 1) three holiday cards sent in 1997 and 1998, 2) one gift in 1997 and 3) checks made out to Ian in 1997 and 1998.[3]

Michelle has known Kate and William's phone number and address throughout Ian's life. However, Kate and William have not been receptive to contact between Michelle and Ian. They were concerned about the impact such contact would have on their litigation with Michelle.[4] In addition, they were afraid of Michelle, believing her to be "a sociopath."

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[3] There is also a November 1997 letter from Michelle to William and Kate wherein Michelle asks to see Ian. Kate testified she never received this letter.

[4] For example, in 1997, William returned to Michelle four checks she had made out to Ian because they had wording on them indicating they were child support payments. William did not want to appear to be recognizing them as such. William also testified that had Michelle sent a card or gift to Ian, he would have discussed with his attorney whether to give them to Ian because of the possible legal implications. Similarly, Kate testified that had Michelle called to ask to see Ian, she did not know whether she would have allowed it and would have asked her attorney.

Since our ruling in August 2000 on the Alameda action, William and Kate have not heard at all from Michelle. She has not asked to see Ian, sent any support or gifts to Ian or otherwise attempted to contact him.

E. The Action to Terminate Michelle's Parental Rights

On January 10, 2003, Kate filed a stepparent adoption request with a petition to terminate Michelle's rights based on abandonment pursuant to Family Code, section 7822(a). The petition alleges Michelle's intent to abandon Ian based on lack of contact or support from August 4, 2000 (the date of our decision in the Alameda action) through January 10, 2003 (the date Kate filed her petition). Michelle was in prison when Kate filed the petition. In fact, Michelle entered prison five months after we issued our August 2000 decision, and remained there for the duration of the abandonment period alleged in the petition.

On March 14, 2003, Michelle mailed a letter from prison to the trial court objecting to the termination of her parental rights. At her request, the court appointed counsel for her and continued trial until after the date Michelle said she would be released from prison.

Trial took place on February 26, 2004, five months after Michelle's release. Shortly before trial, Michelle's court-appointed counsel unsuccessfully moved to be relieved as counsel based on Michelle's unwillingness to cooperate and communicate with her.

Michelle did not attend any proceedings in this action and did not cooperate with her attorney or assist in her defense. She refused to be transported from prison to attend hearings on April 2, 2003 and June 4, 2003. She also refused to attend trial even though she was no longer in prison. She was given notice of the trial and her court-appointed attorney participated in it on her behalf. William and Kate were the only witnesses to testify, and judgment was pronounced at the end of trial.

The trial court terminated Michelle's parental rights based on abandonment and found it was in Ian's best interest to do so.[5]

DISCUSSION

I. We Review the Court's Finding of Abandonment Under the Substantial Evidence Rule.

A proceeding to free a child from a parent's custody and control may be brought where the child has been left "by one parent in the care and custody of the other parent for one year without any provision for the child's support, or without communication from the parent . . . , with the intent on the part of the parent . . . to abandon the child." (Fam. Code, § 7822(a).) The "failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent . . . [has] made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent . . . ." (Fam. Code, § 7822(b).)

A declaration of freedom from parental custody and control terminates all parental rights and responsibilities with regard to the child. (Fam. Code, § 7803.) Consequently, a finding of abandonment must be supported by clear and convincing evidence. (Fam. Code, § 7821.) However, on appeal, the clear and convincing evidence standard disappears. (*In re Mark L*. (2001) 94 Cal.App.4th 573, 580). In its place, we ask whether there is substantial evidence to support the trial court's finding of abandonment. (*Adoption of Oukes* (1971) 14 Cal.App.3d 459, 466 (*Oukes*).) Our power begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, to support the finding. When two or more inferences can reasonably be deduced from the facts, we are without power to substitute our deductions for those of the

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5 The trial court also found Michelle was a parent within the meaning of Family Code, section 7825. Section 7825 provides for the termination of parental rights when the parent is convicted of a felony and the facts of the crime are of such a nature as to prove the parent's unfitness to have the future custody and control of the child. (Fam. Code, § 7825(a).) We need not address whether section 7825 also provides a basis to terminate Michelle's parental rights. As the trial court acknowledged and as we discuss *infra*, section 7822 alone provides a sufficient basis in this case.

trial court. (*In re Heidi T*. (1978) 87 Cal.App.3d 864, 872 (*Heidi*).) We must indulge all legitimate and reasonable inferences in order to uphold the judgment of abandonment if possible. (*In re Marcos S.* (1977) 73 Cal.App.3d 768, 781 (*Marcos*).) And our paramount responsibility is to act in Ian's best interest. (Fam. Code, §§ 7800 (purpose of termination proceedings is to serve child's welfare and best interest), 7801 (mandating liberal construction of termination proceedings to protect child's interests and welfare); *In re Rose G*. (1976) 57 Cal.App.3d 406, 425 (*Rose*) (issue in termination proceeding not "who has the right to custody of the child?" but "what will promote and protect the child's best interest?").)

II. There Was Substantial Evidence to Support The Finding of Abandonment Based On Michelle's Behavior After August 2000.

The trial court found by clear and convincing evidence that Michelle abandoned Ian within the meaning of section 7822 by failing to support or communicate with him during the period alleged in Kate's petition -- August 4, 2000 to January 10, 2003. The court also found evidence of Michelle's intent to abandon in 1) her failure to follow up on her win in the appellate court; and 2) her abandonment of the instant action after her initial letter to the court stating her opposition to it.

It is undisputed that Michelle had no contact with Ian whatsoever during the August 2000 to January 2003 abandonment period. This two-plus year period exceeds the one year period required in section 7822 for a finding of abandonment. Consequently, a presumption of abandonment arose. (*Rose, supra,* 57 Cal.App.3d at p. 423.) Michelle then needed to introduce evidence to contradict the presumed fact of her intent to abandon Ian. (*Id*. at pp. 423-24.) There is no such evidence in the record. Thus, the trial court's finding of intent to abandon was supported by substantial evidence.

As the trial court noted, Michelle was free to seek visitation rights and pursue a trial to establish her parental rights after she prevailed on appeal from the Alameda action. The trial court could rely on Michelle's inaction in the face of our decision as further evidence of intent to abandon. (See *In re Jacqueline H*. (1979) 94 Cal.App.3d

808, 816 (*Jacqueline*) (agreeing with trial court's finding that mother's failure to engage in counseling, which resulted in termination of visitation rights, and her token efforts to regain visitation rights indicated abandonment of the child); cf. *In re Conrich* (1963) 221 Cal.App.2d 662, 666 (*Conrich*) (judicial decree placing child's custody away from parents does not preclude finding of abandonment where the parents subsequently fail to act).)

The court was also entitled to consider Michelle's non-participation in the case as additional evidence of her intent to abandon Ian, notwithstanding her initial letter to the court. (*Conrich, supra*, 221 Cal.App.2d at p. 668 (in finding abandonment, it was within the trial court's discretion to consider that the parents did not appear personally at the abandonment hearing, nor by deposition); *Rose, supra*, 57 Cal.App.3d at p. 424 (intent to abandon may be found on basis of objective measurement of conduct, as opposed to stated desire).) Indeed, it appears that after winning her appeal, the only time Michelle showed an interest in Ian was when she was threatened with legal action. (See *Oukes, supra*, 14 Cal.App.3d at p. 466-67 (in upholding finding of abandonment, noting trial court could have found only time mother manifested interest in children's welfare was when she was threatened by legal action; thus contact prompted by such legal action was token and did not interfere with presumption of abandonment).)

III. Michelle Was Not Excused from Contacting Ian After August 2000.

Because there is no evidence directly contradicting the presumption of abandonment, Michelle argues she was excused from contacting Ian after August 2000. She asserts Kate and William repudiated Michelle's "initial attempts to establish a relationship with" Ian, and argues their behavior excused her from "reattempting contact in the future." We disagree. The mere possibility that Kate and William would have opposed her attempts to contact Ian did not mean she could completely forsake Ian and continue to retain her parental rights.

Michelle cites *Guardianship of Barassi* (1968) 265 Cal.App.2d 282 (*Barassi*) in support of her argument. In that case, despite passage of six years with no contact by the

father, the court found no abandonment because the children's maternal relatives had earlier discouraged the father from contacting the children. (*Id.* at p. 289) However, the abandonment statute relied upon in *Barassi* did not include a presumption of abandonment after one year of no contact, unlike the current section 7822. (See *id*. at p. 288 (quoting Probate Code, section 1409).) In addition, *Barassi's* holding is contrary to case law interpreting the current statute to find abandonment based on the parent's intent to abandon for one year only, not permanently. (Compare *Barassi*, *supra*, 265 Cal.App.2d at p. 288 (stating issue in that case was whether father's conduct showed "intent to relieve himself *permanently* of all parental obligations"; emphasis added) with *In re Daniel M*. (1993) 16 Cal.App.4th 878, 881 (*Daniel*) (rejecting interpretation of current statute to require "an intent to abandon permanently").)

Indeed, Michelle's excuse argument, if accepted, would lead to the absurd result of allowing her to neglect Ian completely during his childhood without jeopardizing her parental rights. The court in *Daniel, supra,* 16 Cal.App.4th 878, rejected a similar argument made by a father who had no contact with his son for more than two years. Like Michelle, the father asserted he was excused from contacting his son because any such effort would have been futile due to interference by the boy's mother. (*Id*. at p. 880.) In refusing to interpret the current abandonment statute to require a permanent intent to abandon, the court noted such an interpretation would allow parents to forsake children for years at a time. "To the contrary, it is apparent the Legislature has determined that the state's interest in the welfare of children justifies the termination of parental rights when a parent fails to communicate with his or her child for at least one year with the intent to abandon the child during that period, even though the parent desires to eventually reestablish the parent-child relationship. In other words, a child's need for a permanent and stable home cannot be postponed for an indefinite period merely because the absent parent may envision renewing contact with the child sometime in the distant future." (*Id*. at p. 884.)

Michelle also asserts she was excused from providing support for Ian during the relevant period because she was indigent. Even if this were true, the court could have

found abandonment based solely on her complete failure to communicate or otherwise contact Ian during that period. (*Oukes, supra*, 14 Cal.App.3d at p. 467 (financial inability may excuse payment of support, but failure to communicate for requisite statutory period is adequate ground to find abandonment).)

Similarly, Michelle's incarceration did not excuse her from contacting Ian. (*Rose, supra*, 57 Cal.App.3d at p. 424 (incarceration does not, in and of itself, provide a legal defense to abandonment).) While in prison, Michelle could have directed her attorney to pursue visitation rights and proceed with trial in the Alameda action on the issue of her parental rights. (See Pen. Code, § 2625 (permitting prisoner to participate in proceedings affecting parental rights).)[6] She also could have at least attempted to call or write to Ian.[7] (Cf. *In re T.M.R.* (1974) 41 Cal.App.3d 694, 699 (finding no abandonment where incarcerated mother wrote to her children twice a month, even though her children were too young to read).)

IV. Michelle's Fraudulent Inducement Argument Does Not Mandate Reversal.

Michelle argues that from the time of the surrogacy agreement through the early stages of the Alameda action, Kate and William "fraudulently induced" her to permit them to have custody of Ian and improperly set in motion the events leading to their abandonment claim. She argues the manner in which Kate and William induced Michelle's cooperation is relevant to whether there is substantial evidence to support the finding of abandonment in this case. However, even if relevant, this argument does not mandate reversal. As discussed *supra*, Michelle's behavior *after* August 2000 provided substantial evidence to support the trial court's finding of the requisite intent to abandon in this case. In reviewing this finding, we need not consider this additional evidence

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6 Indeed, she was given the same opportunity to participate in this case while she was in prison. Her letter to the court requesting counsel and stating her opposition indicates she was aware of this opportunity.

7 William testified he would have accepted a collect call from Michelle while she was in prison.

which pertains to Michelle's intent at around the time of Ian's birth. (See *Heidi, supra,* 87 Cal.App.3d 864, 872 (appellate court's power begins and ends with determination as to whether there is substantial evidence, contradicted or uncontradicted, which will support the finding of abandonment).)[8]

V. The Trial Court's Failure to Consider Appointing Counsel for Ian Did Not Result in a Miscarriage of Justice.

Michelle argues the trial court erred in not *considering* appointment of separate counsel for Ian and in not *appointing* such counsel.[9] We agree the trial court erred, but find no basis for reversal as there was no miscarriage of justice.

At the beginning of a proceeding to terminate parental rights, the court *must* consider whether the child's interests require appointment of independent counsel for him or her. (Fam. Code, §§ 7860, 7861; *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 171 (under section 7861, the court has a *non*-discretionary duty to at least *consider* the appointment).) When no showing is made on the issue of the need for independent counsel for the child, failure to appoint counsel is error. (*In re Richard E.* (1978) 21 Cal.3d 349, 354 (*Richard*); accord *Neumann, supra*, 121 Cal.App.4th at p. 171.) There is nothing in the record indicating the trial court ever considered appointing separate counsel for Ian. This was error.

However, such error does not require reversal in the absence of a miscarriage of justice. (*Richard, supra,* 21 Cal.3d at p. 355; accord *In re Mario C*. (1990) 226 Cal.App.3d 599, 606 (applying *Richard* miscarriage of justice test to current wording of

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8 The trial court could have found additional support for its judgment in the surrogacy agreement and related declarations Michelle signed around the time of Ian's birth. These documents contain language indicating an intent to terminate her parental rights. (See *Oukes, supra*, 14 Cal.App.3d at p. 467 (agreement wherein mother consented to relinquish all claims to custody and transferring absolute custody of children to others was indicative of mother's intent to abandon).)

9 Kate argues Michelle waived this issue by failing to object or request independent counsel. We need not reach the issue of waiver because, as we discuss *infra*, we find no miscarriage of justice from the court's error.

appointment of counsel statute).) This miscarriage of justice test permits reversal only if it is reasonably probable the result would have been different but for the error. (*In re Celine R*. (2003) 31 Cal.4th 45, 60 (*Celine*).)[10]

As explained by the Supreme Court in *Richard*, in an action such as this one there typically is no miscarriage of justice from failure to appoint independent counsel. Challenges are directed against the parent, not against the child. Each side asserts it is protecting the best interests of the child and, in the process, the court becomes fully advised of matters affecting the child's best interests. (*Richard, supra,* 21 Cal.3d at p. 354.)

Michelle argues independent counsel for Ian 1) might have addressed the importance of establishing sibling relationships with Michelle's other children; 2) might have uncovered relevant information concerning the claim of abandonment that the court investigator was unable to uncover; and 3) would have determined whether visitation or shared custody was in the child's best interest, perhaps with a psychological opinion. However, these are all areas that Michelle's own counsel could have addressed or investigated. Had Michelle chosen to testify at trial, her own testimony likely would have been the best source on the first two topics. Presumably, counsel for Ian would have faced the same obstacles created by Michelle's failure to cooperate or assist in her defense as faced by her own counsel. Thus, it does not appear reasonably probable that appointment of counsel for Ian would have yielded a different result.

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10 Michelle argues the standard for reversal set forth in *Celine* is inapplicable to this case because *Celine* was a dependency case where the issue was whether siblings already represented as a group by separate counsel should each have their own counsel. However, the "miscarriage of justice" language originates from the California Constitution's general prohibition on a court setting aside a judgment unless the error has resulted in a miscarriage of justice. The Supreme Court in *Celine* noted that it had interpreted that language "as permitting reversal only if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error." (*Celine*, *supra*, 31 Cal.4th at pp. 59-60.) Since the issue in that case, as in this one, was appointment of counsel for children, and not for one of the parties, the court altered the standard to reversal if the result would have been different, not more favorable. There is nothing in *Celine* to indicate this same standard should not apply to this case.

Michelle relies heavily on *Adoption of Jacob C*. (1994) 25 Cal.App.4th 617 (*Jacob*), to show prejudice from the trial court's failure to appoint independent counsel. But *Jacob* is distinguishable in that the hearing there to terminate parental rights was uncontested. (*Id*. at pp. 622, 626.) Counsel for the mother was not permitted to participate because the mother was a fugitive from justice who had been in hiding with one of the children for about five years. (*Id*. at pp. 620-21, 623.) Michelle admits that the "controlling factor" in the *Jacob* court's decision was that "the children's interests were insufficiently protected because only one adverse party, the stepmother, presented evidence concerning the child[ren] to the court." In contrast, Michelle's counsel was present at trial to advocate an alternative view of what was in Ian's best interest. Although Michelle chose not to attend or be a witness, her counsel was never precluded from doing so, unlike the mother's counsel in *Jacob*.

VI. Alleged Deficiencies in the Investigator's Second Report Do Not Mandate Reversal.[11]

Upon filing a petition to free a child from parental custody and control, a court investigator must investigate the child's circumstances and, in this case, the circumstances alleged to constitute Michelle's abandonment of Ian. (Fam. Code, § 7850.) The investigator must prepare a written report to the court with a recommendation of what disposition would be in the child's best interest. (Fam. Code, § 7851(a).) The court must receive this report into evidence and consider its contents in rendering judgment. (Fam. Code, § 7851(d).) Failure to conduct the investigation and issue the written report is a proper ground for vacating an order terminating parental rights. (*In re Linda W*. (1989) 209 Cal.App.3d 222, 227.)

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11 Kate argues Michelle waived objections to any deficiencies in the report by failing to object to them in the trial court. We need not address this waiver argument because we conclude the report was adequate.

A. The Investigator's Discretion with Ian Did Not Render Her Reports Defective.

Section 7851(b) provides the investigator's report must contain the following statements: 1) the investigator explained to the child the nature of the proceeding to end parental custody and control; 2) the child's feelings and thoughts about the proceeding; 3) the child's attitude toward his parent or parents and whether or not he would prefer living with his parent or parents; and 4) the child was informed of his right to attend the trial and his feelings about attending. (Fam. Code, § 7851(b).) However, if the child's age, or his physical, emotional or other condition precludes him from giving a meaningful response to these explanations, inquiries and information, the report need not include such statements; a description of the condition satisfies the requirement. (Fam. Code, § 7851(c).)

Michelle argues the court improperly permitted Kate's counsel to prohibit Ian from being interviewed for the report. We disagree. The investigator prepared two reports, both of which explained Ian was very young, ignorant of the circumstances of his birth, and had minimal contact with Michelle. These conditions precluded Ian from providing meaningful responses to inquiries into his feelings about the termination proceeding. Consequently, such inquiries were excused.

Shortly after Kate filed her petition in this case, the investigator visited Ian and prepared a brief report. Noting that Ian was five years old at the time, the investigator concluded he was too young to understand "the meaning and implications of this petition." She further reported Ian related to Kate "as his mother" and explained Ian's contact with Michelle since his birth had been minimal. This information satisfied section 7851(b). (Fam. Code, § 7851(c) (description of child's condition precluding meaningful response sufficient); see also *Marcos, supra,* 73 Cal.App.3d at pp. 784-85 (in action to free child from parental custody and control, holding trial court justified in concluding four year old not of sufficient age and capacity to justify any inquiry into his

preference regarding custody where child had minimal contact with natural parent, never spoke about parent, and had bonded with foster parents).)

After Michelle decided to contest the petition, the court asked the investigator to prepare a second, more detailed report. At a hearing discussing preparation of the second report, Kate's counsel noted Ian's young age and his ignorance of the circumstances of his birth. He expressed concern about needlessly traumatizing Ian. The court permitted counsel to express these concerns to a representative of the court investigator's office. The court then told the investigator: "Young Ian has no idea that there could be another human being out there who is potentially a mother. And that is something that we feel is in his best interest at this point to preserve." The court's minute order instructed the court investigator "to use discretion when talking with the child."

In her second report, the investigator explained the factual bases for the need to use discretion with Ian. She again did not ascertain Ian's thoughts and feelings regarding the petition. However, she again observed Ian with Kate and observed they had "a loving, bonded parent/child relationship." As in the first report, the explanation of Ian's condition, i.e., six years old with no knowledge of the circumstances of his birth, *also* satisfied the requirements of section 7851. (Fam. Code, § 7851(c); see also *Marcos, supra,* 73 Cal.App.3d at pp. 784-85.)

Because Ian had never had any relationship with Michelle and did not even know of her existence, it is difficult to imagine how he could have provided meaningful responses to questions about his feelings about her and the proceeding. This difficulty was compounded by his young age.[12] (Cf. Fam. Code, § 7891 (requiring hearing in chambers to determine wishes of child in termination proceeding only when child is 10 years of age or older); *Jacqueline, supra*, 94 Cal.App.3d at p. 815 footnote 3 (in termination proceeding, noting wishes of a seven year old are "hardly conclusive on the

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12 Michelle asserts Ian was of sufficient age and capacity to reason, citing Family Code, section 3042. However, section 3042 merely requires a court to consider the wishes of a child in making a custody order *if* the child is of sufficient age and capacity to reason. It was reasonable for the court to conclude Ian was not.

issue of her best interests.").) This is unlike many dependency cases where a child has lived with the parent and can form a meaningful opinion about whether to continue a parental relationship. None of the cases cited by Michelle involved the issue of soliciting the opinion of a young child who did not even know the existence of the parent. (See, e.g., *In re Jack H.* (1980) 106 Cal.App.3d 257, 260, 269 (children aged 13 and 8 had lived with and visited mother); *In re Mary M.* (1986) 180 Cal.App.3d 1058, 1061-62 (children aged 7 and 5 had lived with parents; no indication they were interviewed for any report to the court).)

On the other hand, revelations about his conception and birth could have been profoundly disturbing to six-year-old Ian. The court properly acted in Ian's best interest by protecting him from unnecessary and potentially traumatic revelations. (See Fam. Code, § 7801 (termination of parental right statutes must be liberally construed to serve and protect child's interests); Fam. Code, § 7890 (in termination proceeding, court must bear in mind child's age and act in child's best interest); cf. *In re Jenelle C.* (1987) 197 Cal.App.3d 813, 818 (no error in not requiring attendance of 6½ year old child at termination hearing where no necessity shown and child's presence could have been "very disturbing and traumatic to her").)

B. There Were No Material Deficiencies in the Second Report.

Michelle asserts the investigator's second report recited statements by Kate and William which were biased and inaccurate, mandating reversal. We disagree.

First, any perceived bias in the report appears to have been caused by Michelle not making herself available for interview despite the investigator's repeated requests. Without Michelle's assistance, the investigator was forced to rely more heavily on Kate and William's statements. In fact, the investigator admits that her investigation was "handicapped" by Michelle's "failure to cooperate."[13]

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13 The investigator noted Michelle's lack of cooperation prevented her from 1) ascertaining the stability of Michelle's present living situation; 2) ascertaining the names and telephone

Second, as Michelle admits, the court had at its disposal testimony and other documentary evidence in the record upon which to check the accuracy of the report's statements.[14] In particular, both Kate and William testified at trial, and were cross-examined by Michelle's counsel on the very statements Michelle alleges were biased and inaccurate. Consequently, even if the report did contain inaccuracies, in light of all of the evidence before the court, we need not reverse. (See *In re Crystal J*. (1993) 12 Cal.App.4th 407, 413 (*Crystal*) (deficiencies in assessment report in dependency case did not mandate reversal when, reviewing totality of evidence before the court, including live testimony, there was ample evidence to support court's judgment); *Heidi, supra,* 87 Cal.App.3d at p. 875 (in termination proceeding, given abundance of evidence independent of report to sustain judgment, any technical deficiencies in report were harmless).)[15]

C. The Filing of the Second Report Two Days Before Trial Was Not a Denial of Due Process.

Michelle argues she was denied due process because the second report was filed two days before trial. We disagree. Michelle cites no authority showing that the timing of the report's filing mandates reversal. The relevant statute is silent on when the report must be filed. (See Fam. Code, § 7851(d) (stating only that the court must receive the report in evidence).) And there is no harm alleged to Michelle from the timing of the report's filing. (See *Crystal, supra*, 12 Cal.App.4th at p. 413 (in dependency action,

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numbers of collateral contacts, such as whoever cared for Michelle's other biological children while she was in prison; and 3) interviewing the man who currently resides with her.

14 For example, inaccuracies regarding the terms of the surrogacy contract could be checked against the actual contract, which was in the record. Also in the record are testimony and documentary evidence regarding how many checks Michelle sent to Ian.

15 This case is distinguishable from *In re George G*. (1977) 68 Cal.App.3d 146, 156-59 (*George*), cited by Michelle, wherein the only evidence supporting abandonment was in the report. In *George*, the author of the report acknowledged at trial that all of the pertinent information in the report came from unspecified social services records. The *George* court held it was reversible error for the trial court to prevent the parents from examining those records or striking those portions of the report which relied upon those records. (*Id*.)

where assessment report is available to parties in advance of the noticed hearing and report addresses principal questions at issue, no denial of due process).)

The record does not indicate the report contained anything that could have come as a surprise to Michelle, especially given her prior litigation with Kate and William in the Alameda action. Moreover, Kate's trial brief described largely the same facts and allegations. It was served on Michelle 20 days before trial.

There is nothing in the record indicating Michelle's counsel was unable to subpoena witnesses. And as discussed above, Michelle's counsel was able to cross-examine Kate and William regarding alleged inaccuracies in the report, and there was documentary evidence against which to check such inaccuracies.

VII. There Was No Ineffective Assistance of Counsel.

Michelle argues any failure by her court appointed attorney to make the arguments she makes on appeal or to preserve those arguments for appeal demonstrates ineffective assistance of counsel and requires reversal. Because we do not base our decision to affirm the trial court's judgment on any such failures by Michelle's counsel, we find there was no ineffective assistance of counsel in this case.

DISPOSITION

The judgment is affirmed.

_____
Parrilli, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.